Supreme Court, U.S.
FILED

No. _____

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In The OFFICE OF THE CLERK

Supreme Court of the United States

WILLIS W. DAVID, JR.,

Petitioner,

v.

JACQUELINE M. DAVID,

Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI

WILLIS W. DAVID, JR.
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QUESTION PRESENTED FOR REVIEW

Whether state courts may deviate from federal guidance designed to ensure equitable division in the award of military retirement pay to a former spouse in a divorce proceeding when the ability to divide comes from a specific grant of authority from Congress.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the December 9, 2009, judgment and opinion of the Montana Supreme Court.

OPINIONS BELOW

The opinion and judgment of the Montana Supreme Court of December 9, 2009, *In re Marriage of David*, is reported at both 354 Mont. 44 and 221 P.3d 1209 (2009) and is reprinted at App. 1.

The opinion of the Montana First Judicial District Court, Lewis and Clark County, *David v. David*, is not reported but is reprinted at App. 10.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Montana Supreme Court of December 9, 2009. The U.S. Supreme Court has jurisdiction to review cases from state supreme courts when federal rights are involved by virtue of 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

This case involves the interpretation and application of the Uniformed Services Former Spouses'

Protection Act ("USFSPA"), Pub. L. No. 97-252, 96 Stat. 730 (1982), currently codified as amended at 10 U.S.C. § 1408. App. 16.

STATEMENT

The U.S. Congress has prescribed a wide array of benefits for the men and women of the United States armed forces. Among these is a retirement entitlement upon completing the statutory period. However, it would be most correctly classified as a retainer or retirement pay rather than a pension because the members must adhere to a number of conditions to receive and remains subject to recall to active duty. *See e.g.* 10 U.S.C. §§ 688, 802(a)(4), and 1401 *et seq.*

The Court examined the character of the military retirement pay in the context of its treatment of a divorce in *McCarty v. McCarty*, 453 U.S. 210 (1981) where, based on the above considerations, the Court held military retirement pay to be the sole property of the military member but that Congress had the ability to change that. Passage of the USFSPA in 1982, retroactive to the day prior to the *McCarty* decision, allowed the states to consider military retirement pay as marital property to be divided in a divorce. However, a number of conditions were placed on that authority.

In spite of almost 30 years of operation under this statute, there are many variations in interpretations by state courts. The fact that a military

member may serve (involuntarily) in many states over the course of a career, a matter of basic fairness would imply that all states should treat the military retirement the same in a divorce.

Petitioner was married to Respondent in the State of Wisconsin in 1983. The parties later moved to Montana. Petitioner had been a member of the Army National Guard on active duty for more than 20 years at the time of the divorce and remains on active duty in the National Guard. Therefore, the exact amount of military retirement pay that would be marital property and subject to division was unknown at the time of divorce, so the trial court (Montana First Judicial District Court, Lewis and Clark County) elected to use the 'time-rule' formula for division of the pay. Such formula is used to calculate the amount of overlap of the marriage and military service and is used to calculate the percentage of the military retirement that is equitably marital property and therefore subject to division under the USFSPA. However, the time-rule formula does not account specifically for promotions after the finalization of the divorce. Therefore, since pay increases with increased rank and years of service the former spouse inequitably receives a greater share of the military retirement pay then he/she should be otherwise entitled to receive.

Petitioner appealed the calculation of the portion of military retirement pay subject to division by the court, as well as two related issues. The Montana Supreme Court upheld the lower court on all three

issues in the decision that is the basis for this petition. This timely petition for writ of certiorari follows.

Although this petition involves only one military member, it has the potential to clarify issues involved in the divorces of thousands of service members.

REASONS FOR GRANTING THE PETITION

SUMMARY OF THE ARGUMENT

This Court has, over the years, helped shape the characterization of the military retirement system. There can be no doubt as to the substantial federal interest in the fairness and operation of the military retirement system. Therefore, when federal legislation allows state courts to divide military retirement pay during a divorce, but does not ensure that the federal interests and Constitutional rights of the service members are properly protected, such legislation must fail. In the instant case, the Montana Supreme Court failed to ensure an equitable result by allowing the trial court to ignore the value of the military retirement that would accrue after the parties are divorced. In doing so, the Montana Supreme Court consciously rejected a method of calculation provided by military, pursuant to exclusive Congressional authority in military matters.

ARGUMENT

A. The State Courts Are Able To Divide Military Retirement Pay Only By Express Grant By Congress And Should Be Obligated To Follow Federal Guidance Stemming From That Grant.

The division of military retirement pay made by a state court in a divorce rests on a specific grant by Congress. This Court has specifically held that without a specific grant by Congress, state courts do not have the power to divide military pay as property in a divorce. *McCarty v. McCarty*, 453 U.S. 210, 235-36, 101 S. Ct. 2728, 2742-43 (1981). Congress then responded to the Court's holding and invitation by enacting legislation to do just that the following year. Uniformed Service Former Spouses Protection Act (USFSPA) of Sept. 8, 1982, Pub. L. No. 97-252, 1982 U.S.C.C.A.N. (96 Stat.) 730 (codified at 10 U.S.C. § 1408). The USFSPA **allowed** the states to consider military retirement pay as property in a divorce but did not require it. 10 U.S.C. § 1408(c)(2) (" . . . a court may treat disposable retired pay payable to a member for pay periods . . . either as property solely of the member or as property of the member and his spouse. . . ."). However, Congress limited this authority by stipulating a number of procedures to be followed as well as the maximum amounts that could be paid under this authority. 10 U.S.C. § 1408(e). This Court has also acknowledged the continued federal interest in this issue. In 1989, this Court held that the divisible portion of the military retirement excluded military retirement pay waived for disability pay.

Mansell v. Mansell, 490 U.S. 581, 594-95, 109 S. Ct. 2023, 2032 (1989). There has never been federal law or policy articulated that indicates the federal government has abdicated all interest in the issue of military retirement pay in a divorce. Therefore, the grant of the authority to the States by the federal government implies a responsibility to follow any and all federal guidance on this issue. To allow States to be able to exercise a grant of federal authority but ignore the accompanying guidance is illogical.

B. Failure To Follow Federal Guidance Regarding The Nature Of The Military Retirement Pay Violates The Constitution And The Concept Of Federalism.

The Federal government is responsible for the armed forces of the United States of America. The grant to raise and provide for an army and a navy are enumerated powers of Congress under the Constitution. U.S. CONST. art. I, § 8, cl. 12-13. This power is broad and sweeping. *U.S. v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968). The fact that Petitioner was a member of the National Guard during portions of his service does not affect this. *Perpich v. Dept. of Defense*, 496 U.S. 334, 349-51 110 S. Ct. 2418, 2427-29 (1990). The supremacy of federal regulation over state control for military matters is clear. *See id.*

Additionally, Petitioner served in multiple states during his military service. A citizen of one State is

free from interference of another State. U.S. CONST. amend. XIV. As such, for a Montana court to treat the portion of his retirement pay earned while a resident of a state that follows the federal guidance abridges his rights as a citizen of the other state. It has also been long established by this Court that state courts may be limited in their rulings in divorce proceedings; the concept of a 'divisible divorce' recognizes that a court has only the power to divide the property under its control. *See Rice v. Rice*, 336 U.S. 674 (1949). The Montana Supreme Court freely acknowledges that there are opposing views on the rules applied by different states on the issue at bar. *In re Marriage of David*, 354 Mont. 44, 45, 221 P.3d 1209, 1212 (2009). This is but one example of wide variations in treatment of military retirement pay by the States during a divorce. *See* Ann K. Wooster, Annotation, *Construction and Application of Federal Uniformed Services Former Spouse Protection Act in State Court Divorce Proceedings*, 2003 A.L.R.5th 7 (2009).

The treatment of military retirement pay in a state divorce proceeding is an interesting overlap of federal and state responsibilities. Since there is no grant of authority to the federal government to deal with divorce issues, divorce should remain primarily a state responsibility. *McCarty*, U.S. 453 at 220, 101 S. Ct. at 2735. However, this is limited to the point where their actions conflict and interfere with federal interests. *Id.* This balance has been shown to be best served when state courts adhere to federal law when dividing military retirement pay in a divorce.

The points discussed in this section require that states have been limited in their ability to divide military retirement pay and their discretion is bound by these limits in order to conform to the U.S. Constitution and its concept of federalism.

C. States Should Follow Federal Guidance That Is Designed To Ensure An Equitable Solution Is Reached In Divorces Of Military Personnel In Federal Service.

In furtherance of its constitutional duties to provide for the military services, Congress has clearly indicated that it retains authority for the states' division of military retirement pay. Congress specifically expressed its intent that this statute be applied uniformly. 10 U.S.C. § 1408(j). In furtherance of this act, the Department of Defense has enacted a stream of regulations, procedural books, and other products to expand upon this statute. *See e.g.* DoD Financial Management Regulation Vol. 7B, Ch. 29, Feb. 2009.

The heart of this issue is that marital property should be equitably divided in a divorce. There is general agreement among the states that the marital property portion of a retirement is that portion earned during the marriage. *See* Charles C. Marvel, Annotation, *Pension or Retirement Benefits as Subject to Award or Division by Court in Settlement of Property Rights between Spouses*, 94 A.L.R.3d 176 (2009). Additionally, since military retirement pay is very specialized and solely the province of the federal

government under its military powers, logic would dictate that the federal definition of what is and is not marital property should be binding on the states. This method of calculation provided by the federal military pay center (Defense Finance and Accounting Service – DFAS) provides for an equitable division of military retirement pay taking into account the additional length of service and promotions that a service member receives after the divorce. *In re Marriage of David*, 354 Mont., at 45-46, 221 P.3d, at 1211-12. By not doing so, a court fails to make an equitable division of the military retirement pay. *See generally* S. REP. No. 97-502 (1982) (expressing concerns about achieving equity and fairness in dividing military pay). However, even though the Montana court acknowledged that the federal government has a suggested method of calculating the marital portion of the retirement pay to account for additional service and promotions that Petitioner may receive in order to achieve an equitable result, the court felt that it has the discretionary power to ignore this guidance. *Id.*

The Montana Supreme Court used a deferential standard in upholding the lower court ruling. However, as discussed *supra*, the division of military retirement is a cautious balance between enumerated duties of the federal government and the traditional reluctance of the federal courts to interfere in family matters. However, lower state courts may not be in a position to correctly balance the federal and state interests on their own. Therefore, state supreme

courts should have a duty to ensure the lower state courts conform to federal guidance as to the proper way to handle military (federal) pay issues.

CONCLUSION

When Congress passed the USFSPA as a rejection of this Court's sound logic in the *McCarty* decision, it authorized state courts to divide military retirement pay but under this authority an entire set of regulations and procedures has been promulgated to ensure that state courts can achieve an equitable result. However, if state courts use the authority given to them but are free to reject the accompanying guidance that ensures the proper balance of responsibilities under our federal system of government, then U.S. federal military members are left unprotected from the unchecked but varying interpretations of federal military pay system by the state courts, which this Court should reject as being at variance with the U.S. Constitution. For this reason, the Court should grant certiorari to review this important issue of military service and compensation.

Respectfully submitted,

WILLIS W. DAVID, JR.
PRO SE PETITIONER

March 9, 2010

DA 08-0272

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2009 MT 422

IN RE THE MARRIAGE OF
JACQUELINE M. DAVID,

Petitioner and Appellee,

and

WILLIS W. DAVID, JR.,

Respondent and Appellant.

APPEAL FROM: District Court of the First Judicial District, In and For the County of Lewis and Clark,
Cause No. CDR-2005-141
Honorable Thomas C. Honzel,
Presiding Judge

COUNSEL OF RECORD:

For Appellant:

James P. Reynolds, Reynolds, Motl and Sherwood, P.L.L.P.,
Helena, Montana

For Appellee:

Mark P. Yeshe, Attorney at Law,
Helena, Montana

Submitted on Briefs: April 8, 2009

Decided: December 9, 2009

Filed:

_____

Clerk

Justice James C. Nelson delivered the Opinion of the Court.

¶1 The First Judicial District Court, Lewis and Clark County, dissolved the parties' marriage; established a parenting plan and ordered Willis W. David, Jr., to pay child support for their minor child; and divided the marital estate. Willis appeals. We affirm.

¶2 The issues are:

¶3 1. Did the District Court abuse its discretion by applying the time rule formula to divide Willis's pension?

¶4 2. Did the District Court abuse its discretion by not directing Jacqueline M. David (Jackie) to reimburse Willis for the cost of the survivor benefit plan?

¶5 3. Did the District Court abuse its discretion by its distribution of the marital estate?

BACKGROUND

¶6 The parties were married in Wisconsin in 1983 and moved to Montana soon thereafter. Two children were born to the marriage, one of whom had attained the age of 18 when the marriage was dissolved in 2008.

¶7 At the time of the dissolution hearings, Jackie, a 44-year-old high school graduate, was self-employed as a contract rural mail carrier. Her contract paid her $41,318 per year, of which she netted $24,797 in 2005. She had been the primary caregiver for the children. At the time of the hearings, 46-year-old Willis had been employed by the Montana National Guard for 20 years. He was both on active duty and a member of the Guard's reserve component, with a base salary of $52,549 per year. In addition, he received $1,012 each month as a basic housing allowance and $187.49 as a basic subsistence allowance, both of which are non-taxable income.

¶8 The District Court dissolved the parties' marriage, adopted a parenting plan for their younger child, and ordered Willis to pay Jackie $569 per month as child support, plus $5,358 in arrearages, and to continue to maintain health and dental insurance for the younger child. The court also divided the parties' personal property. It ordered the proceeds of the sale of the family home split between the parties after payment of credit card debt, and ordered Willis to pay Jackie $3,045 for her share of a half-acre of property that he retained. The court also awarded Jackie a portion of Willis's anticipated retirement benefits. Willis appeals.

STANDARD OF REVIEW

¶9 We review a district court's division of marital property to determine whether the trial court's

findings are clearly erroneous. If the court's findings are not clearly erroneous, we will affirm the distribution of property unless the court abused its discretion. The test for an abuse of discretion in a marriage dissolution proceeding is whether the trial court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *In re Marriage of Pospisil,* 2000 MT 132, ¶ 19, 299 Mont. 527, 1 P.3d 364.

DISCUSSION

¶10 ***Issue 1. Did the District Court abuse its discretion by applying the time rule formula to divide Willis's pension?***

¶11 It is well-established that retirement benefits are part of a marital estate. *Rolfe v. Rolfe,* 234 Mont. 294, 296, 766 P.2d 223, 225 (1988). In *Rolfe,* we adopted what is known as the time rule formula for dividing retirement benefit payments between parties to a dissolution of marriage. This formula is used in situations in which the spouse entitled to a retirement benefit has not yet ended employment, so that the retirement benefit is not yet being received. Under the formula, the non-employee spouse's share of the retirement benefit is computed by dividing the employee spouse's years of service during the marriage by the employee spouse's total years of service, and then multiplying the result by one half of the employee spouse's monthly after-tax retirement

benefits. *Rolfe,* 234 Mont. at 298, 766 P.2d at 226. In the present case, the District Court's decree of dissolution provides that the time rule formula will be used to determine Jackie's share of Willis's retirement benefits when he retires from the National Guard.

¶12 Willis contends the court instead should have used a format recommended by the Defense Finance and Accounting Service (DFAS), the federal agency charged with paying out military pensions to retirees and, in the case of divorce, their ex-spouses. Under that format, an award to an ex-spouse of a person who is still on active duty at the time of the divorce will not provide the ex-spouse the benefit of any of the military member's post-divorce promotions or pay increases after the divorce; an award to Jackie of a share of Willis's retirement income would be calculated using a hypothetical retirement date of the date the marriage was dissolved. Willis presented, as an exhibit at trial, a publication setting forth the DFAS recommendations. He maintains the District Court abused its discretion in failing to use the DFAS-recommended method to calculate Jackie's share of his retirement.

¶13 Willis points out that many states have adopted the principle, reflected in the DFAS recommendations but not in the time rule formula, that an ex-spouse should not benefit from a service member's post-divorce promotions or pay increases. *See e.g. Grier v. Grier,* 731 S.W.2d 931 (Tex. 1987). However, Jackie points out that other states have considered but not

adopted the DFAS recommendations, having ultimately determined it more fair to use the time rule formula. *See In re Marriage of Hunt,* 909 P.2d 525 (Colo. 1995).

¶14 The time rule formula employed by the District Court in dividing Willis's future retirement benefits has been approved by this Court and used in Montana since 1988. Willis has failed to convince us that the District Court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice when it used that formula to determine the manner in which Willis's retirement benefits will be divided. We hold that the District Court did not abuse its discretion by applying the time rule formula to divide Willis's pension.

¶15 ***Issue 2. Did the District Court abuse its discretion by not directing Jackie to reimburse Willis for the cost of the survivor benefit plan?***

¶16 Survivor Benefit Plan (SBP) coverage allows a non-service member former spouse of a service member to receive a portion of the service member's retirement after the death of the service member. *See* 10 U.S.C. § 1448(b). The District Court's decree of dissolution states Willis has elected SBP coverage for Jackie through his employer, and orders that he shall not change that election and shall continue to participate in SBP and to designate Jackie as his beneficiary. Willis contends the parties agreed, at the

dissolution hearing, that Jackie would reimburse Willis for SBP premiums. That provision does not appear in the dissolution decree, and Willis argues its omission represents an abuse of discretion. Nothing in the record indicates the amount of those monthly premiums.

¶17 The transcript of the second hearing in this matter shows that Jackie's counsel pointed out to the District Court that, under her proposed findings of fact, she would reimburse Willis for SBP premiums. However, the District Court was not required to adopt that proposed finding, or any other proposed finding submitted by the parties. We note that the court did not adopt all of the proposed findings presented by either party.

¶18 We hold Willis has failed to establish that the District Court abused its discretion by failing to direct Jackie to reimburse Willis for the cost of the survivor benefit plan.

¶19 ***Issue 3. Did the District Court abuse its discretion by its distribution of the marital estate?***

¶20 Under this issue, Willis claims the parties made a pre-hearing agreement on various property division issues which the District Court did not honor. Specifically, Willis claims the parties agreed that the date first set for the dissolution hearing – in December of 2005 – would be the cutoff date used in computing Jackie's interest in his retirement benefits. The District Court instead used the May 2006

hearing date. Willis also points out that the court gave Jackie property valued at approximately $9,000 more than the property it ordered distributed to him, which he contends violates the agreement of the parties that the marital estate would be divided equally between them.

¶21 Jackie responds that there was no executed agreement between the parties on these matters. The record supports her position. Moreover, as a general rule, the value of marital assets should be determined at or near the time of dissolution. *See In re Marriage of Hochhalter,* 2001 MT 268, ¶ 17, 307 Mont. 261, 37 P.3d 665. The end date selected by the District Court for computation of the value of Jackie's interest in Willis's future retirement benefits meets that description. Also, the court was not required to award the parties property of precisely equal value. *See In re Marriage of Payer,* 2005 MT 89, ¶ 14, 326 Mont. 459, 110 P.3d 460. We hold Willis has not established that the District Court abused its discretion by its distribution of the marital estate.

¶22 Affirmed.

/S/ JAMES C. NELSON

We concur:

/S/ MIKE McGRATH
/S/ JOHN WARNER
/S/ JIM RICE
/S/ BRIAN MORRIS

Justice John Warner concurs.

¶23 I concur with the Court's Opinion. However, in my view, the Opinion cannot be read to require that a district court must in every instance utilize the formula affirmed in this case when it distributes a retirement plan. Nor is it required that a district court always divide that portion of a plan which is being distributed equally between the parties. An even distribution is not mandated by § 40-4-202, MCA, which is flexible and vests a good deal of discretion in the district court. As this Court has consistently stated, each case must be looked at individually, with an eye to its unique circumstances. *Marriage of Harris,* 2006 MT 63, ¶ 17, 331 Mont. 368, 132 P.3d 502; *Marriage of Laster,* 197 Mont. 470, 476, 643 P.2d 597, 601 (1982).

/S/ JOHN WARNER

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

IN RE THE MARRIAGE OF JACQUELINE M. DAVID, Petitioner, and WILLIS W. DAVID, JR., Respondent	CAUSE NO. CDR-2005-141 **DECREE OF DISSOLUTION OF MARRIAGE** (Filed Mar. 12, 2008)

On June 5, 2007, the Court made and entered its Findings of Fact and Conclusions of Law, and Final Parenting Plan. Based upon those Findings of Fact, Conclusions of Law, and Final Parenting Plan,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The marriage of the parties is dissolved.

2. The Final Parenting Plan that was entered herein on June 5, 2007, is in the best interests of the parties' child Tiffany, and the parties shall abide by the terms of that Plan.

3. Commencing June 1, 2007, Willis shall pay Jackie the sum of $569.00 per month as and for child support for Tiffany. Child support shall be paid by way of income withholding from Willis' wages. Willis' child support obligation shall continue until Tiffany reaches the age of 18 or graduates from high school, whichever comes later, but in no event should his

child support obligation continue beyond Tiffany's 19th birthday.

4. Willis owes Jackie the sum of $5,358.00 for child support arrearages for the period from September 1, 2005 through May 30, 2007. Beginning June 1, 2007, Willis shall begin to pay this arrearage at the rate of not less than $150.00 per month until paid.

5. The Court adopts as part of this Decree the following Medical Support Order:

a. Willis shall keep the child enrolled in the current health and dental insurance plans.

b. Willis shall provide medical care and health and dental insurance for the child in the future, including in the event the current coverage for the child terminates, so long as the cost of the insurance is reasonable.

c. Willis shall pay the entire net premium cost of providing the current health and dental insurance and any succeeding health and dental insurance for the child.

d. Willis shall pay 60% and Jackie shall pay 40% of any co-payments, any deductibles required under the coverage, and all medical, dental, orthodontic, pharmaceutical, optical and mental health care expenses for the child not covered by insurance.

e. The parties shall provide for the medical care and health and dental insurance for their minor child as set forth above until terminated by emancipation

of the child or the child's graduation from high school if the child is enrolled in high school, whichever occurs later, but in no event later than the child's 19th birthday.

6. The parties have a daughter, Sara David (DOB 1/19/89), as well as their daughter Tiffany. Sara is emancipated. Pursuant to an agreement of the parties that was filed by them on April 24, 2007, Willis shall claim Sara on his state and federal tax returns for tax year 2006 and for each year thereafter in which she may be claimed as a dependent. Willis may claim and use any deductions, exemptions, and credits associated with Sara in any such year, except that the earned income credit shall be handled as follows. Jackie shall be entitled to claim the earned income credit for Sara, except that in the event that Willis' income is at a level where he is able to use the earned income credit for Sara, he may do so in any such year. Jackie shall claim Tiffany on her state and federal tax returns for tax year 2006 and for each year thereafter in which Tiffany may be claimed as a dependent. Jackie may claim and use any deductions, exemptions, and credits associated with Tiffany in any such year, and she may file as head of household in any such year. The parties have agreed that the provisions regarding tax deductions, exemptions and credits may not be modified, and it is therefore so ordered.

7. Willis is on active duty with the Montana National Guard, and he is also a member of the reserve component of the National Guard. Willis

participates in both the active duty component and the reserve component of the military retirement system. Willis is vested in both components of the retirement system. However, he can retire under only one of the programs.

8. The parties were married for ten years or more while Wills performed ten years or more of military service creditable for retirement purposes. The Court has jurisdiction over Willis pursuant to 10 U.S.C. §1408(c)(4) because Willis has consented to jurisdiction, and he is domiciled in the state of Montana.

9. If Willis retires under the active duty retirement program, Jackie shall be awarded a percentage of Willis' disposable military retired pay, to be computed by multiplying 50 percent times a fraction, the numerator of which is 224 months of marriage during Willis' creditable military service, divided by Willis' total number of months of creditable military service.

10. If Willis retires under the reserve retirement plan, Jackie shall be awarded a percentage of Willis' disposable military retired pay, to be computed by multiplying 50 per cent times a fraction, the numerator of which is 7,017 reserve retirement points earned during the period of the marriage, divided by Willis' total number of reserve retirement points earned.

11. Willis has elected Survivor Benefit Plan (SBP) coverage for Jackie. He shall not change that

election; he shall continue to participate in the SBP; he shall continue to designate Jackie as his beneficiary; and if he must make a future election to insure that Jackie has SBP coverage, he shall do so.

12. Jackie shall receive the following items of personal property:

2000 GMC Sierra pickup	$13,745
2000 Jeep Cherokee	$7,450
Personal property and household furnishings	$6,700
Jackie's IRA	$1,803
Jackie's life insurance policy (cash value)	$6,240
Total	$35,938

13. Willis shall receive the following personal property:

1991 Chevrolet S-10	$2,175
1979 GMC K-15	$1,300
1979 Chevrolet C-15	$500
1997 Honda ATV	$1,965
2000 Ski-Doo	$1,310
1980 Circle J trailer	$500
Personal property and household furnishings	$13,000
Willis' IRA	$2,100
Willis' life insurance policy (cash value)	$4,100
Total	$26,950

14. The parties have divided their household furnishings and other items of personal property with the exception of a quilt that Willis' aunt made for him

and a saddle which Willis purchased. Jackie shall make a good faith effort to locate and return to Willis the quilt his aunt made. Jackie shall retain the saddle.

15. The parties have agreed that the 1988 Toyota Corolla is Sara's car, and it shall therefore be treated as such.

16. Each party shall receive one-half of the proceeds the parties received from the sale of their home, less the amount paid by them toward credit card debt. From his share of the house sale proceeds Willis shall pay Jackie $3,045 for her interest in the one-half acre of land Willis received from the home site and the expenses associated with his receipt of that parcel.

17. Each party shall pay his or her own attorney fees.

IT IS SO ORDERED this the 10th day of March, 2008.

/s/ THOMAS C. HONZEL
DISTRICT COURT JUDGE

10 U.S.C. § 1408. Payment of retired or retainer pay in compliance with court orders

(a) **Definitions.** – In this section:

(1) The term "court" means –

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and

(D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a

decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which –

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for –

(i) payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659 (i)(2)));

(ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has

been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which –

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 12731 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) Effective Service of Process. – For the purposes of this section –

(1) service of a court order is effective if –

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by facsimile or electronic transmission or by mail;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Servicemembers Civil Relief Act (50 App. U.S.C. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order –

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) Authority for Court To Treat Retired Pay as Property of the Member and Spouse. –

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse

(A) was issued before June 25, 1981, and

(B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned

under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of

(A) his residence, other than because of military assignment, in the territorial jurisdiction of the court,

(B) his domicile in the territorial jurisdiction of the court, or

(C) his consent to the jurisdiction of the court.

(d) Payments by Secretary Concerned to (or for Benefit of) Spouse or Former Spouse. – (1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the

member to the spouse or former spouse (or for the benefit of such spouse or former spouse to a State disbursement unit established pursuant to section 454B of the Social Security Act or other public payee designated by a State, in accordance with part D of title IV of the Social Security Act, as directed by court order, or as otherwise directed in accordance with such part D) in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a spouse or former spouse who, pursuant to section 408(a)(3) of the Social Security Act (42 U.S.C. 608(a)(4)), assigns to a State the rights of the spouse or former spouse to receive support, the Secretary concerned may make the child support payments referred to in the preceding sentence to that State in amounts consistent with that assignment of rights. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least

10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former

spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(6) In the case of a court order for which effective service is made on the Secretary concerned on or after August 22, 1996, and which provides for payments from the disposable retired pay of a member to satisfy the amount of child support set forth in the order, the authority provided in paragraph (1) to make payments from the disposable retired pay of a member to satisfy the amount of child support set forth in a court order shall apply to payment of any amount of child support arrearages set forth in that order as well as to amounts of child support that currently become due.

(7)

(A) The Secretary concerned may not accept service of a court order that is an out-of-State modification, or comply with the provisions of such a court order, unless the court issuing that order has jurisdiction in the manner specified in subsection (c)(4) over both the member and the spouse or former spouse involved.

(B) A court order shall be considered to be an out-of-State modification for purposes of this paragraph if the order –

(i) modifies a previous court order under this section upon which payments under this subsection are based; and

(ii) is issued by a court of a State other than the State of the court that issued the previous court order.

(e) Limitations. –

(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)

(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall –

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable

retired pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of –

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus –

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)

(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member

may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other

than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) Immunity of Officers and Employees of United States. –

(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (i).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (i), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) Notice to Member of Service of Court Order on Secretary Concerned. – A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order

(together with a copy of such order) to the member affected by the court order at his last known address.

(h) Benefits for Dependents Who Are Victims of Abuse by Members Losing Right to Retired Pay. –

(1)

(A) If, in the case of a member or former member of the armed forces referred to in paragraph (2)(A), a court order provides (in the manner applicable to a division of property) for the payment of an amount from the disposable retired pay of that member or former member (as certified under paragraph (4)) to an eligible spouse or former spouse of that member or former member, the Secretary concerned, beginning upon effective service of such court order, shall pay that amount in accordance with this subsection to such spouse or former spouse.

(B) If, in the case of a member or former member of the armed forces referred to in paragraph (2)(A), a court order provides for the payment as child support of an amount from the disposable retired pay of that member or former member (as certified under paragraph (4)) to an eligible dependent child of the member or former member, the Secretary concerned, beginning upon effective service of such court order, shall pay that amount in accordance with this subsection to such dependent child.

(2) A spouse or former spouse, or a dependent child, of a member or former member of the armed forces is eligible to receive payment under this subsection if –

(A) the member or former member, while a member of the armed forces and after becoming eligible to be retired from the armed forces on the basis of years of service, has eligibility to receive retired pay terminated as a result of misconduct while a member involving abuse of a spouse or dependent child (as defined in regulations prescribed by the Secretary of Defense or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Homeland Security); and [1]

(B) in the case of eligibility of a spouse or former spouse under paragraph (1)(A), the spouse or former spouse –

(i) was the victim of the abuse and was married to the member or former member at the time of that abuse; or

(ii) is a natural or adopted parent of a dependent child of the member or former member who was the victim of the abuse; and

(C) in the case of eligibility of a dependent child under paragraph (1)(B), the other parent of the child died as a result of the misconduct that resulted in the termination of retired pay.

(3) The amount certified by the Secretary concerned under paragraph (4) with respect to a member or former member of the armed forces referred to in

paragraph (2)(A) shall be deemed to be the disposable retired pay of that member or former member for the purposes of this subsection.

(4) Upon the request of a court or an eligible spouse or former spouse, or an eligible dependent child, of a member or former member of the armed forces referred to in paragraph (2)(A) in connection with a civil action for the issuance of a court order in the case of that member or former member, the Secretary concerned shall determine and certify the amount of the monthly retired pay that the member or former member would have been entitled to receive as of the date of the certification –

(A) if the member or former member's eligibility for retired pay had not been terminated as described in paragraph (2)(A); and

(B) if, in the case of a member or former member not in receipt of retired pay immediately before that termination of eligibility for retired pay, the member or former member had retired on the effective date of that termination of eligibility.

(5) A court order under this subsection may provide that whenever retired pay is increased under section 1401a of this title (or any other provision of law), the amount payable under the court order to the spouse or former spouse, or the dependent child, of a member or former member described in paragraph (2)(A) shall be increased at the same time by the percent by which the retired pay of the member or former

member would have been increased if the member or former member were receiving retired pay.

(6) Notwithstanding any other provision of law, a member or former member of the armed forces referred to in paragraph (2)(A) shall have no ownership interest in, or claim against, any amount payable under this section to a spouse or former spouse, or to a dependent child, of the member or former member.

(7)

(A) If a former spouse receiving payments under this subsection with respect to a member or former member referred to in paragraph (2)(A) marries again after such payments begin, the eligibility of the former spouse to receive further payments under this subsection shall terminate on the date of such marriage.

(B) A person's eligibility to receive payments under this subsection that is terminated under subparagraph (A) by reason of remarriage shall be resumed in the event of the termination of that marriage by the death of that person's spouse or by annulment or divorce. The resumption of payments shall begin as of the first day of the month in which that marriage is so terminated. The monthly amount of the payments shall be the amount that would have been paid if the continuity of the payments had not been interrupted by the marriage.

(8) Payments in accordance with this subsection shall be made out of funds in the Department of Defense Military Retirement Fund established by section 1461 of this title or, in the case of the Coast Guard, out of funds appropriated to the Department of Homeland Security for payment of retired pay for the Coast Guard.

(9)

(A) A spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A), while receiving payments in accordance with this subsection, shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to receive any other benefit that a spouse or a former spouse of a retired member of the armed forces is entitled to receive on the basis of being a spouse or former spouse, as the case may be, of a retired member of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(B) A dependent child of a member or former member referred to in paragraph (2)(A) who was a member of the household of the member or former member at the time of the misconduct described in paragraph (2)(A) shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to have other benefits provided to dependents of retired members of the armed forces in the same manner as if the member or former member

referred to in paragraph (2)(A) was entitled to retired pay.

(C) If a spouse or former spouse or a dependent child eligible or entitled to receive a particular benefit under this paragraph is eligible or entitled to receive that benefit under another provision of law, the eligibility or entitlement of that spouse or former spouse or dependent child to such benefit shall be determined under such other provision of law instead of this paragraph.

(10)

(A) For purposes of this subsection, in the case of a member of the armed forces who has been sentenced by a court-martial to receive a punishment that will terminate the eligibility of that member to receive retired pay if executed, the eligibility of that member to receive retired pay may, as determined by the Secretary concerned, be considered terminated effective upon the approval of that sentence by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice).

(B) If each form of the punishment that would result in the termination of eligibility to receive retired pay is later remitted, set aside, or mitigated to a punishment that does not result in the termination of that eligibility, a payment of benefits to the eligible recipient under this subsection that is based on the punishment so vacated, set aside, or mitigated shall cease. The cessation of payments shall be effective as of the first day of the first month following the

month in which the Secretary concerned notifies the recipient of such benefits in writing that payment of the benefits will cease. The recipient may not be required to repay the benefits received before that effective date (except to the extent necessary to recoup any amount that was erroneous when paid).

(11) In this subsection, the term "dependent child", with respect to a member or former member of the armed forces referred to in paragraph (2)(A), means an unmarried legitimate child, including an adopted child or a stepchild of the member or former member, who –

(A) is under 18 years of age;

(B) is incapable of self-support because of a mental or physical incapacity that existed before becoming 18 years of age and is dependent on the member or former member for over one-half of the child's support; or

(C) if enrolled in a full-time course of study in an institution of higher education recognized by the Secretary of Defense for the purposes of this subparagraph, is under 23 years of age and is dependent on the member or former member for over one-half of the child's support.

(i) Certification Date. – It is not necessary that the date of a certification of the authenticity or completeness of a copy of a court order for child support received by the Secretary concerned for the purposes

of this section be recent in relation to the date of receipt by the Secretary.

(j) Regulations. – The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(k) Relationship to Other Laws. – In any case involving an order providing for payment of child support (as defined in section 459(i)(2) of the Social Security Act) by a member who has never been married to the other parent of the child, the provisions of this section shall not apply, and the case shall be subject to the provisions of section 459 of such Act.

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No. 09-1087

In The Supreme Court of the United States

WILLIS W. DAVID, JR.,

Petitioner,

v.

JACQUELINE M. DAVID,

Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF FOR UNIFORMED SERVICES FORMER SPOUSE PROTECTION ACT LIBERATION SUPPORT GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether state courts may deviate from federal guidance designed to ensure equitable division in the award of military retirement pay to a former spouse in a divorce proceeding when the ability to divide comes from a specific grant of authority from Congress.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Uniformed Services Former Spouses Protection Act (USFSPA) Liberation Support Group (ULSG) is a non-profit organization, chartered expressly to deal with the impact of the USFSPA on personnel of the military uniformed services. ULSG members are active duty, retired, reserve and National Guard members of the uniformed services of both sexes as well as their spouses and other interested parties.

Service in the Armed Forces of the United States creates a special trust between service members and the federal government. Service members endure years of hardship during military service, separated from the comforts of home, friends and family, while relying on the federal government to provide the tools they need to serve. One of these is the freedom from inappropriate control by foreign governments and States of the Union.

Service members are all volunteers who serve overseas and within the borders of the United States, as needs of the Armed Services dictate. As such, members do not ultimately control where they are assigned, but may be sent involuntarily to various

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[1] Counsel for *amicus curiae* authored this brief in whole and no other person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Petitioner provided with 10 day notice of *amicus* brief but respondent had by that time already exercised her right to respond and therefore waived right to object to *amicus* brief.

states and nations. However, as a result of actions taken in furtherance of federal service, they can be subject to the jurisdiction of courts of states other than those of their legal residence. A central premise to the concept of a federal military is that there cannot be significant differences in the treatment of service members among states in matters that interfere with federal control of the military forces.

This Court recognized the strong federal interests in the military retirement system in its decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981), holding that the military retirement pay could not be divided by state courts. In response, Congress passed the USFSPA,[2] retroactive to the *McCarty* decision, to allow state courts to divide the military retirement/retainer pay in a divorce. This case challenges the ability of state courts to ignore guidance provided along with that authority to ensure the proper application of the USFSPA in a state divorce proceeding, thereby severing that special trust between service members and the federal government.

Amicus curiae ULSG accepts the factual basis provided by the petition and hereby incorporate these facts by reference.

This brief is submitted with the consent of the Petitioner; Respondent has exercised her right not to

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[2] Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified at 10 U.S.C. §1408 (2006)).

respond and has thus waived her right to object to this brief.

SUMMARY OF THE ARGUMENT

This case presents a unique question with regards to the U.S. concept of federalism – federal military law versus state divorce law.

The retirement/retainer pay of the members of Armed Forces of the United States has been determined by this Court to be a very special type of compensation. Military retirement pay has more the character of a retainer pay than an actual retirement pay because the military retiree must conform to a number of conditions to receive it; these conditions are established by federal law, not state law. This pay was not subject to division in a divorce as established by this court until passage of the Uniformed Services Former Spouses Protection Act by Congress in 1982. The Federal Government, through its finance centers, has promulgated a procedure to quantify the amount that should be subject to division by a state court in a divorce proceeding.

State courts have jurisdiction over a divorce proceeding. However, when deciding issues on federal law, state courts do not have the expertise to fully understand the impacts of their decisions and are therefore in need of, and should follow federal guidance regarding questions of federal law. The Montana Supreme Court acknowledged that issues of federal

pay are handled differently by the states but held that such decisions should be left to the discretion of the local courts; such an interpretation cannot stand.

ARGUMENT

A. REVIEW IS NECESSARY TO ENSURE THAT FEDERAL MILITARY MEMBERS ARE PROTECTED FROM VARYING STATE INTERPRETATIONS OF FEDERAL LAW

Members of the uniformed services are part of the federal government and should be entitled to standard treatment by the states for matters regarding this status. Military members serve in many states, often involuntarily. The states have made widely varying applications of the USFSPA. *See* Ann K. Wooster, J.D., Annotation, *Construction and Application of Federal Uniformed Services Former Spouse Protection Act in State Court Divorce Proceedings*, 2003 A.L.R.5th 7 (2009). Allowing this discrepancy to continue unchecked violates the trust of the military members, thereby impacting federal concerns of readiness; when a state function substantially interferes with a federal one, the federal interest must preempt the state interest. *Boggs v. Boggs*, 520 U.S. 833, 844, 117 S. Ct. 1754, 1762 (1997). If federal review of such actions is not possible, then service members are left to the unchecked variances of state courts that can tread into areas of federal responsibility. Since state trial courts, often with the use of only martial masters, *see Witte v. Justices of the N.H. Supreme Court*,

831 F.2d 362 (1st Cir. 1987), are making decisions regarding the interpretation of federal military matters, federal oversight is constitutionally and logically indicated.

The interaction between the federal and state responsibilities in a military divorce is difficult. "A more complex mix of federal and state rules would be hard to imagine." Mark E. Sullivan, *Military Pension Division: Crossing the Minefield*, 31 Fam. L. Q. 19, 19 (1997). It is easy to define a balance regarding the USFSPA consistent with federalism whereas the states divide the pay as authorized by Congress but Congress, and by extension the federal government, retains the authority to define the character of military pay. However, in this case, the State of Montana has exceeded that authorization and upset this proper balance. Therefore, the Court should grant certiorari to reestablish and reassert the proper balance of interests consistent with the U.S. concept of federalism.

B. FEDERAL REVIEW IS APPROPRIATE BECAUSE THE FEDERAL GOVERNMENT HAS NOT INDICATED THAT IT INTENDS TO ABDICATE ITS RESPONSIBILITY IN THIS AREA OF LAW

The issue of division of the military retirement pay in a divorce is a difficult issue for federalism. Whereas states retain responsibility for family matters (divorce), *see Hisquierdo v. Hisquierdo*, 439 U.S.

572, 581, 99 S. Ct. 802, 808 (1979), the federal government is responsible for military matters. U.S. Const. art. I, §8. The federal government still retains this responsibility for retired service members who are still members of the military. *See United States v. Tyler,* 105 U.S. 244 (1882). After the Court's decision in *McCarty*, the USFSPA was passed to give states the authority to divide military pay as property in a divorce. 10 U.S.C. §1408(c). However, Congress included a number of limits on this authority, indicating that the federal government still retains overall control. 10 U.S.C. §1408(e). For this reason, the states should be restrained by federal interpretations as to the character of the military retired pay. The proper way to define the amount of federal military retirement pay subject to division in a state court divorce proceeding has been defined by the Department of Defense in its Financial Management Regulation to exclude amounts of retirement pay based on post-divorce longevity and rank increases. DoD Fin. Mgt. Reg., Vol. 7B, Chap. 29, paras. 290213, 290608 (2009). The regulations of the Defense Finance and Accounting System (DFAS) are expressions of the federal government's desire to maintain control over the federal aspects of military pay matters consistent with the U.S. Constitution.

C. STATES THAT FAIL TO FOLLOW THE FINANCE CENTER PROCEDURE COULD UNJUSTLY ENRICH A FORMER SPOUSE AT THE EXPENSE OF A MILITARY RETIREE IN VIOLATION OF THE FIFTH AMENDMENT

When the State of Montana failed to exclude from the marital estate the value that will be earned after the divorce, the State of Montana unlawfully and unjustifiably exceeded its authority, thereby denying Petitioner due process. Military retirement pay is set as a percentage of ending military pay, which is determined by the rank and length of service of the individual. 10 U.S.C. §1409. In this case, Petitioner and Respondent were divorced prior to the end of the military career, so the monthly retirement entitlement will further increase based on post-divorce service. The DFAS formula accounts for such an eventuality whereas the State of Montana formula used does not. Therefore, the order being appealed divides as marital property something earned post-marriage. It is well-settled that marital property does not accumulate after a divorce, with only the portion associated with the marriage considered to be marital property. 41 C.J.S. *Husband and Wife* §277 (2009). The authorization used by the State, 10 U.S.C. §1408(c), allows division of marital property but does not stand alone; instead, it is a part of a body of law joined with the implementing regulations. A State may only divide that which it has a legal basis for. *See McCarty v. McCarty*, 453 U.S. 210, 236, 101 S. Ct. 2728, 2743 (1981). Since the State of Montana has

ordered division of military retirement pay outside of the definition of marital property, this constitutes unjust enrichment for the Respondent. *See United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276 (1943) (discussing the concept of unjust enrichment under federal law). By extending its powers over a citizen beyond lawful justification, a state denies due process in the denial of property to that citizen in violation of the U.S. Constitution. U.S. Const. amend. XIV. Therefore, the State of Montana has exceeded its authority and this action constitutes an unlawful action and violation of Petitioner's federal constitutional rights and review by the Court is necessary to prevent this injustice.

CONCLUSION

The USFSPA, in the text of the statute, fails to adequately protect federal military retirees in a divorce, so the Department of Defense has promulgated regulations to ensure just that. However, the courts of the State of Montana held that it may take advantage of a federal statute but yet not be bound by the amplifying secondary legislation to ensure that responsibilities assigned to the federal government by the Constitution are met. In its decision that is the subject of this appeal, the Supreme Court of Montana acknowledged the split in interpretation by the states over a matter controlled by federal law by specific grant of authority to the federal government by the U.S. Constitution. The Court should grant review of

this case to firmly examine this issue to ensure that states are not overstepping their boundaries to impermissibly and inconsistently interfere with the federal military pay system.

Respectfully submitted,

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